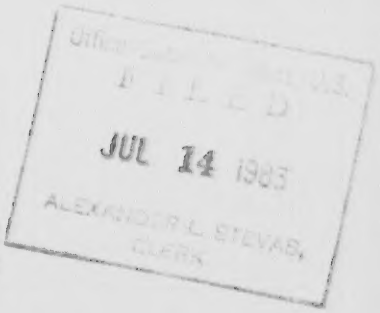

No. 82-2064

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

QUALITY FORD, INC., a
Utah corporation, THOMAS
REDD and VIOLET REDD,

Petitioners,

vs.

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Delaware Corporation and
FORD MOTOR CREDIT COMPANY,
a Delaware corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Does a notice of appeal from a non-final order invoke the jurisdiction of the Circuit Court of Appeals when there is no appeal from the final order?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES INVOLVED

The statutes and rules involved in this case are 28 U.S.C. §§ 1291 and 2107, and Fed. R. App. P. 4(a), set out in full in Appendix A.

STATEMENT OF THE CASE

28 U.S.C. § 1291 provides for appeals from final orders. This provision is jurisdictional. Browder v. Director, Ill. Dept. of Corrections,

434 U.S. 257, 264 (1978). Petitioners attempted to appeal from a nonfinal order, i.e., the granting of respondents' Motion for Summary Judgment. That order dismissed only as to Ford Motor Company and Ford Motor Credit Company. It did not dismiss as to two other individual defendants, Bambrough and Van Keuren. While it is true that petitioners had, for all practical purposes, settled the case with Bambrough and Van Keuren, the trial court had never approved the settlement, had never entered an order dismissing Van Keuren or Bambrough, and had never issued an order approving the filing of an amended Complaint deleting them as defendants.

The Clerk of the Tenth Circuit Court of Appeals informed the parties

that the court was considering summary dismissal of the appeal for lack of jurisdiction because it appeared the order appealed from was nonfinal in that other defendants remained in the case. The Clerk of the Tenth Circuit Court of Appeals specifically referred petitioners to Golden Villa Spa, Inc. v. Health Industries, Inc., 549 F.2d 1363 (10th Cir. 1977), and Lamp v. Andrus, 657 F.2d 1157 (10th Cir. 1981). Lamp v. Andrus, in turn, cites A. O. Smith Corporation v. Sims Consolidated, Ltd., 647 F.2d 118 (10th Cir. 1981), wherein the Tenth Circuit Court of Appeals dismissed an appeal from a nonfinal judgment. Petitioners returned to the District Court and obtained a final order dismissing the other defendants, but did not appeal

from the final order. The Tenth Circuit then dismissed the attempted appeal of the nonfinal order for lack of jurisdiction.

In response to the Tenth Circuit's finding of lack of jurisdiction, petitioners have attempted to justify their failure to appeal the final order in this case by claiming that a law clerk working for the firm representing petitioners prepared and filed the Motion and Order dismissing other defendants which became the final order from which no appeal was taken. Petitioners further claim that after the order was signed, that fact was not brought to the attention of counsel for petitioners.

Petitioners now ask the Court, as they asked the Tenth Circuit, to ignore

the following facts: First, the Tenth Circuit noted in its Order denying the appellants' Petition for Rehearing and Suggestion for Rehearing En Banc that "A reading of these decisions should have made the requirement for filing a second notice of appeal apparent." Second, the motion seeking the dismissal of the other defendants was signed by the attorney for the petitioners. Third, the Order signed by the District Court dismissing the Complaint against the other defendants was mailed to counsel for the petitioners. Under these circumstances, Petitioners cannot claim that their failure to file a new notice of appeal from the final order is excuseable. United States v. Robinson, 361 U.S. 220 (1960).

SUMMARY OF ARGUMENT

The petitioners have failed to demonstrate a conflict between the decision of the Tenth Circuit Court of Appeals in this case and decisions of other courts of appeals in similar cases. The cases cited by the petitioners as conflicting with the holding of the Tenth Circuit Court of Appeals in this matter are not applicable to the facts of this case. To the extent there was any conflict between decisions of the courts of appeals on this issue, that conflict was resolved by this Court's holding in Griggs v. Provident Consumer Discount Company, 103 S.Ct. 400 (1982) (per curiam). There being no demonstrated conflict between the decisions of the courts of appeal, the Court should deny the Petition for

a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

ARGUMENT

PETITIONERS HAVE FAILED TO ESTABLISH THAT THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE QUESTION PRESENTED, AND TO THE EXTENT THERE WAS ANY CONFLICT, IT WAS ELIMINATED BY GRIGGS.

The authorities cited by the petitioners are not contrary to the rule applied by the Tenth Circuit Court of Appeals in dismissing the appeal below. None of the cases cited supports the proposition that a notice of appeal from a nonfinal order invokes the jur-

isdiction of the court of appeals when a final order is entered.

The petitioners claim that in several courts of appeals premature notices of appeal invoke the jurisdiction of the courts. The authorities cited by the petitioners relate to types of premature appeals not raised by the facts of this case, and fail to establish that their notice of appeal was anything other than a nullity.

The cases cited by petitioners fall into three general categories. First, the petitioners cite cases within the purview of Fed.R.App.P. 4(a)(2), i.e., notices of appeal filed after announcement of a final order, but before entry of the final order. For example, in Lemke v. United States, 346 U.S. 325 (1953) (per curiam), the petitioner's

notice of appeal was filed after sentencing, but before a formal judgment was entered. The Supreme Court reversed the Ninth Circuit's dismissal of the appeal, holding that the irregularity should be disregarded. This holding was later codified as Fed.R.App.P. 4(a)(2), which states, "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." See also Markham v. Holt, 369 F.2d 940 (5th Cir. 1955). In both Firchau v. Diamond National Corporation, 345 F.2d 269 (9th Cir. 1965), and Ruby v. Secretary of United States Navy, 365 F.2d 385 (9th Cir. 1966), the court of ap-

peals held that it would construe the notices of appeal of orders dismissing complaints as applying to the final orders dismissing the actions, rather than the nonappealable orders dismissing the complaints. These cases are similar to cases encompassed by the Fed.R.App.P. 4(a)(2), since the intentions of the district courts to dismiss the actions in the event amended complaints were not filed were apparent, and later ripened into final orders of dismissal. All these cases differ materially from the case at hand, in that the district courts had announced their final orders, but had not yet entered the judgments. In this case, petitioners attempted to appeal a non-final order before the final order had ever been announced.

The second category of cases cited by the petitioners deal with instances where final orders actually exist and notices of appeal have been liberally construed to apply to the existing final orders. For example, in Hoiness v. United States, 335 U.S. 297 (1948), the Supreme Court interpreted a petition for appeal as referring to a final and appealable order, even though the petition for appeal specifically referred to a subsequent, non-appealable order. Thus, in Hoiness, there was, at the time the petition for appeal was filed, a final order from which an appeal could timely have been taken. See also United States v. Arizona, 346 U.S. 907 (1953) (mem.), opinion below, 206 F.2d 159 (9th Cir. 1953); State Farm Mutual Automobile Insurance Co. v.

Palmer, 350 U.S. 944 (1956) (mem.), opinion below, 225 F.2d 876 (9th Cir. 1955); United States v. Ellicott, 223 U.S. 524 (1912); Maddox v. Black, Raber-Kief & Assoc., 303 F.2d 910 (9th Cir. 1962); Crump v. Hill, 104 F.2d 36 (5th Cir. 1939); Jordan v. United States District Court for the District of Columbia, 233 F.2d 362 (D.C. Cir. 1956); Blunt v. United States, 244 F.2d 355 (D.C. Cir. 1957); and Burdix v. United States, 231 F.2d 893 (9th Cir. 1956), cert. denied, 351 U.S. 975 (1956). In the foregoing cases, each appellate court liberally construed a notice of appeal as encompassing an existing final order other than that specifically mentioned in the notice, or construed an inartfully captioned document as a notice of appeal. In any

event, in each of the foregoing cases, contrary to this case, there was a final and appealable judgment.

Finally, the petitioners cite a group of cases which have been overruled by Fed.R.App.P. 4(a) and the Court's ruling in Griggs v. Provident Consumer Discount Company, 103 Sup.Ct. 400 (1982) (per curiam). These cases hold that a notice of appeal filed after judgment, but prior to disposition of post-trial motions, effectively appeals the final judgment. See Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir. 1971); Williams v. Town of Okoboji, 599 F.2d 238 (8th Cir 1979); and Keohane v. Swarco, Inc., 320 F.2d 429 (6th Cir. 1963). In Griggs v. Provident Consumer Discount Company, supra, this Court held that a notice of

appeal filed after judgment, but prior to a disposition of a post-trial motion to alter or amend the judgment, was a nullity. Since the holdings in the cases cited by petitioners have been overruled by Fed.R.App.P. 4(a) and Griggs v. Provident Consumer Discount Company, supra, there no longer can be a conflict between those decisions and the decision of the Tenth Circuit Court of Appeals in this case.

CONCLUSION

The petitioners have sought to establish a conflict of authority between the circuit courts of appeal, but have failed to evidence such conflict.

The claimed conflict among decisions of the various circuit courts of

appeal relied upon by the petitioners is non-existent when the facts of the cases are examined. Each "premature" notice of appeal in these cases differs materially from the petitioners' situation. In the instant case, the petitioners attempted to appeal from a non-final order. When informed of the jurisdictional problem, the petitioners procured a final order, then failed to appeal from it. There are no special circumstances justifying a result different from the Tenth Circuit's holding, and no cases have been cited by petitioners in which other courts of appeal have held differently on the same facts. Further, to the extent a conflict did exist, it has been eliminated by Griggs.

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

Harold G. Christensen*
R. Brent Stephens
Attorneys for Respondents

*Counsel of Record

APPENDIX A

28 U.S.C. § 2107. Time for appeal to court of appeals.

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after

the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for

the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

RULE 4, Fed. R. App. P. Appeal as of Right -- When Taken.

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of

appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a deci-

sion or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make aditional findings of fact, whether or not an alteration of the judgment would be required if the

motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed

time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

APPENDIX B

RULE 28 LISTING OF CORPORATE AFFILIATIONS

Respondent Ford Motor Company is the parent company.

Respondent Ford Motor Credit Company is a wholly owned subsidiary of Ford Motor Company.

The following are non-wholly-owned subsidiaries and affiliates of Ford Motor Company in the United States:

Eveleth Taconite Company
Renaissance Center Partnership
Fairlane Town Center (a partnership)

Ford Motor Company has other consolidated and unconsolidated subsidiaries which are located in the United States and in foreign countries, the majority of which have the Ford name incorporated therein or do not involve private financial interests.